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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 475.

ANNE E. SCHULTZ, as Administratrix of the Goods, Chattels, Rights and Credits which were of John C. Schultz, and as Administratrix Ad Prosequendum of John C. Schultz, deceased,

Petitioner,

vs.

HOME OIL COMPANY, a corporation,

Respondent.

BRIEF OPPOSING THE ISSUE OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

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IN THE

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OCTOBER TERM, 1957.

No. 475.

ANNE E. SCHULTZ, as Administratrix of the Goods, Chattels, Rights and Credits which were of John C. Schultz, and as Administratrix Ad Prosequendum of John C. Schultz, deceased,

Petitioner,

v.

HOME OIL COMPANY, a corporation,

Respondent.

BRIEF OPPOSING THE ISSUE OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY.

Respondent Home Oil Company prays the Court deny the Petition filed herein on the grounds that (1) no substantial federal question is presented, (2) the asserted grounds urged as the basis for the issue of the writ herein were not raised at any prior stage of the proceedings below, and (3) no right guaranteed petitioner under the Constitution of the State of New Jersey has been denied below.

Opinion Below.

The opinion set forth in the Petition is that of the highest court of the State of New Jersey to which an appeal as of right will lie under the circumstances of this case. Further review by the Supreme Court of New Jersey is available only by was of certification, pursuant to Rules of the Supreme Court, R. R. 1:10-2, the text of which is set forth in Appendix I, *infra*. As can be seen, the ground urged before this Court for the issue of certiorari is not enumerated among the criteria governing the granting of certification. The proper method of raising before the Supreme Court of New Jersey the question now urged is by petition for certification to the trial court, for at that much earlier stage of the proceedings, questions concerning constitutional rights may be reviewed. R. R. 1:10-3 (Appendix II). Such procedure was not followed below. Respondent submits that, if any constitutional question is to be considered here, petitioner must cite from the record the opinion of the trial judge which trespassed upon her right.

Jurisdiction.

Respondent denies that the proper basis for certiorari has been laid by petitioner. The statute provides that such review may be had only from "Final judgments or decrees rendered by the highest court * * * in which a decision could be had * * *." 28 U. S. C. 1257; June 25, 1948, c. 646, 62 Stat. 929. From what has immediately preceded, it is clear that a review of the constitutional issue raised here might have been obtained before the Supreme Court of New Jersey. No such relief was sought.

Respondent further denies that Rule 19 gives any color of propriety to petitioner's application, for nowhere in the petition is it pointed out where a state court has decided a federal question of substance in the proceedings below. Rule 19, par. 1 (a).

Questions Presented.

1. Where, in a state court negligence action, plaintiff fails to prove any act of defendant's was negligent; fails to establish within the realm of reasonable probability circumstances indicating any negligence of defendant, and fails to exclude the probability that plaintiff's injury stemmed from causes with which the defendant's conduct was unconnected; produces proof from which an inference of negligence is no more probable than freedom from negligence; offers opinion evidence which admittedly is not based upon a factual foundation and, in sum, fails to produce a *prima facie* case, is it the duty of a trial judge to take the case from the jury and enter a judgment of dismissal as a matter of law?

2. Where plaintiff has failed to assert in any state court that his constitutional rights have been infringed, and cannot now point to any place in the record at which such an assertion has been made; and further has failed to include in his Petition for Certiorari any such indication, should this Court deny certiorari?

3. Are not plaintiff's procedural remedies defined by the rules and law of the forum in which he has instituted his action, absent the assertion of a paramount federal right?

4. Will this Court grant certiorari to review a factual conclusion in which three courts below concur?

Reasons for Denying Certiorari.

1. All the courts below concur in finding that plaintiff's evidence fell short of establishing a *prima facie* case.

2. Plaintiff has never heretofore raised any constitutional questions involving either a federally protected right or one protected by the Constitution of the State of New Jersey in this action.

3. The action of all the state courts herein have accorded with New Jersey law and the state and federal constitutions.

Statement of the Case.

This action was brought to recover damages for injuries inflicted upon plaintiff's decedent allegedly caused by the negligent conduct of several defendants, of which respondent, Home Oil Company (herein called "defendant") was one named in the complaint. On motion for judgment made by defendant at the close of all evidence (Tr. 380), the trial court entered final judgment dismissing the complaint on the ground that plaintiff had produced no evidence tending to establish that the injury complained of was the result of any negligence on the part of defendant (Tr. 384 to 385). The final judgment of the trial court was appealed on the merits to the Superior Court of New Jersey, Appellate Division, and affirmed unanimously. (Appendix A.) Thereupon, plaintiff petitioned the Supreme Court of New Jersey to grant certification on the grounds (1) that the decision of the Appellate Division conflicted with other decisions of that court, and (2) that the decision of the Appellate Divi-

sion was in conflict with "established law". The Supreme Court denied certification. (Appendix C).

On January 23, 1943 (Tr. 119) at approximately ten minutes to seven in the evening (Tr. 119, 262), at 333-335 River Street, Paterson, New Jersey (Tr. 120, 262); at a gasoline filling station commonly known as "Tubby's" (Tr. 120) there occurred what was variously described as "a superficial fire" (Tr. 132), "a flash fire" (Tr. 133) and an "explosion" (Tr. 81). Plaintiff's decedent, John Schultz, was employed by the owner of the station, Joseph DeMarco (Tr. 59), at a salary of $50.00 per week (Tr. 61). He was on duty at the time these events occurred and was severely injured (Tr. 131, 132), of which injuries he subsequently died (Tr. 236).

Soso Cokinos is a refuse dealer who used to park his three trucks (Tr. 282) behind Tubby's Gas Station (P189a-17). At the close of the day's business, he would do his bookkeeping, and plan the next day's business operations, in a corner of the station office (Tr. 283). On the date in question, Soso entered the office at about 6:30 P. M. and began his usual routine of work (Tr. 284). It was stuffy and hot in the station, but there were then no gasoline fumes noticeable (Tr. 285). After Soso had been thus engaged for some brief period of time, John Schultz came in with a bucket (Tr. 305), or can, of about four or five gallons' capacity (Tr. 285). Cokinos estimated that it contained about 2½ gallons of gasoline (Tr. 303). Schultz began cleaning tools with the gasoline (Tr. 284) and this activity generated a great concentration of gasoline vapor which became nauseating (Tr. 303). After complaining to John Schultz about the fumes (Tr. 254), Soso left for the

tavern next door to the station to complete his task (Tr. 286). Shortly thereafter the "explosion" in question occurred, and Soso, together with some others, returned to the scene (Tr. 301). Perhaps it may be signally significant to observe at this point that DeMarco testified John Schultz was a smoker, and that he smoked while inside the station (Tr. 97).

The gasoline station building had two sets of gas tanks in the ground (Tr. 50), each with its own sets of "vents"; that is, pipes running from the underground tanks to a point upon the exterior walls of the station itself. Two of these vents, the ones in back of the building, had been installed prior to any time that either DeMarco, or defendant, had any connection with the station (Tr. 54, 56). The other vents, together with the tanks they served, were installed in 1940 (Tr. 51) by Aquino Construction Company, apparently at the request of defendant (Tr. 52). These vents appear to have been located on a side wall of the building.

In the walls of the station there were two fixed windows —"big windows like store windows"—(Tr. 69) in the bottom frames of which were a series of little holes (Tr. 68) (also described in the testimony as "vents"). These holes were always open and admitted a certain amount of circulation of air between the exterior of the building and its interior (Tr. 70). Also there was an air compressor in the office (Tr. 57). The brushes of the motor for this compressor were exposed, but DeMarco stated that he had never seen any sparks given off from them before the date in question (Tr. 60).

To establish some evidence of negligence on the part of defendant, and also to show some degree of causal connection between the injury to plaintiff's decedent and the supposed negligence, plaintiff relied upon the testimony of Joseph L. Devenport, deputy chief of the Paterson Fire Department (Tr. 113). Devenport was the fire commanding officer at the scene of the alarm, and it was his duty to determine as well as he was able, the cause of the fire he had come to extinguish (Tr. 119). In doing so, he had a brief conversation with DeMarco at the scene of the alarm (Tr. 120) with respect to the conditions in the station prior to the fire (Tr. 121 to 123). He then looked inside the building, seeking especially after any containers which might have held a volatile liquid (Tr. 134). He found one or two shallow pans, but concluded from his inspection of them that they had not contained any such liquid (Tr. 134). Devenport did determine that the fire had been caused by gasoline vapor "in some manner, shape or form" (Tr. 134). Devenport did not determine, and plaintiff offered no proof as to, why this gasoline vapor exploded at all. Even now no efficient agent is mentioned. Having found no source of vapor within, Chief Devenport concluded that it must have come from outside the building; specifically from the vent pipes (Tr. 150).

Thus, the factual issues upon which a conclusion of defendant's liability was made to depend appeared, from plaintiff's case to be: (1) the source of any gasoline vapor (assuming, *arguendo,* that the substance was the efficient agency), (2) the method of introduction of such vapor into the room where the fire occurred, (3) the agency that ignited the vapor on the site, (4) whether any other agency

concurred with, augmented or superseded the effect of the igniting vapor, and (5) whether any act or omission of defendant, as distinguished from that of any other person, in the judgment of a reasonably prudent man, forseeably might probably have brought into play any of the foregoing elements, and, if so, (6) whether such foregoing elements were the natural and proximate consequence of the said act or omission of defendant or of another, or both.

The first factual difficulty encountered by plaintiff was the production of any reliable evidence as to the source of the gasoline vapor supposed to have been the agent of destruction. Both Chief Devenport and Detective Dworak, in searching for the origin of this fire, looked for a container with gasoline in it (Tr. 147; 233). Neither found such an article.

On the question as to where the fumes did come from, plaintiff offered Chief Devenport as "the greatest expert in the world" (Tr. 170). The chief, finding in his own opinion "no possible source of gasoline vapors inside the building" (Tr. 150), concluded that the fumes came from the exterior vent pipes (Tr. 151). The chief stated that these fumes *could have entered* the building through the front door, the back door, or the holes in the window frames already mentioned (emphasis added). Actually, however, Chief Devenport did not come to any factual conclusion as to the origin of the fumes in question (Tr. 145, 146). He did have an opinion on the subject, but, factually, the chief admitted that there was nothing to substantiate what he gave as his opinion (Tr. 172, 173). In view of there being two sets of vent pipes on the building, only one set having been installed by defendant, defendant's attorney assumed,

for the sake of the inquiry he was then conducting, that fumes had come from one set or the other of the vent pipes, as Devenport has concluded. The chief was asked "did the fumes that you think went into the building come from the vent pipes on the side of the building or from the vent pipes at the rear of the building?" (Tr. 184). The witness couldn't answer the question—he didn't know (Tr. 184, 185). When he was given a fresh opportunity to answer the same question, the chief—quite consistently—again replied that he could not with a reasonable degree of probability, indicate which pipes were the source of the fumes (Tr. 190, 191). In point of fact, although the chief had available an explosion meter (Tr. 199) with which to test for the presence of fumes, he never tested either set of vent pipes to see whether either could be the source of the gasoline vapor (Tr. 202). Further, he admitted that any gasoline vapor forced out of these vent pipes when the tanks had last been filled probably had been dissipated in the air within the 24 to 36 hours preceding the fire (Tr. 202, 203). He admitted frankly that none of these fumes went into the building (Tr. 203, 204).

Despite the apparent lack of a factual foundation therefor, Chief Devenport nevertheless was permitted to express his opinion at the trial that the outside vent pipes were the only "possible" source of the fumes that caused the fire (Tr. 149). In contradistinction to this opinion, the witness had submitted an official report on the fire in question in which he listed the cause as one of "unknown origin of suspicious nature" (Tr. 171, 206). However, on cross examination, he was asked whether his opinion would be the same if when he arrived at the scene he had seen a container of gasoline inside the station with tools in it. The witness

answered that his opinion would not be the same (Tr. 209, 210). Defendant then asked what opinion the witness would have if he had seen the facts as hypothecated to him but plaintiff's attorney would not permit the question to be answered (Tr. 211, 212). Significantly, the factors included in this hypothesis were later testified to by defendant's witness, Soso Cokinos. To be sure, plaintiff's attorney made much of the fact that Cokinos could not find the bucket Schultz had used in any of the photographs taken by the police at the fire (Tr. 302, 303). This oddity was cleared up later on, however, when the witness Winchell testified that these photographs did not include the portion of the office at which the fire started (Tr. 378).

Whether fumes could come from the exterior vent pipes and enter the building was the second difficulty plaintiff had to surmount. To begin with, the chief testified that the vents, at the time the fire occurred, were an adequate means of diffusing gasoline fumes rising from the tanks underground (Tr. 163). This accorded with his testimony, previously mentioned, that vapor expelled 24 to 36 hours prior to the fire had dissipated into the air and not entered the station building. However, plaintiff's theory, and the witness' testimony, was that gasoline vapor came out of the vent pipes and *accumulated* adjacent to the building (Tr. 150). (Not even a wild guess was made as to how the vapor "accumulated" before it seeped into the building.) Then, the story goes, the vapor entered the building through the doorways and the holes beneath the large, fixed windows (Tr. 156). As the witness put it, "Any of these openings is a possible source for the gas fumes to get into the building, any of these openings are a possible source" (Tr. 152). And again, in speaking of the holes in the win-

dow frames, the witness described them as things "which could be a source for gasoline vapors in the building" (Tr. 157). When pressed on this point, however, Devenport denied having made a categorical statement that the vapor probably did go through the window-sash holes. He "stated that that could be the case" (Tr. 176). He made the same reservation with respect to the back door, stating that the entrance of vapor through both the window-sash holes and the back door was only a "possibility" (Tr. 178, 189).

With respect to these window-sash holes, although the chief had told the jury that they "could" have been the means whereby vapor entered the building, he didn't even investigate to find out before he testified whether these holes went all the way through the window sash! (Tr. 194, 195).

On the two general factual questions which preceded all the others, then, namely (1) where the vapor came from, and (2) how it got into the building, plaintiff's case is aptly summed up by the testimony of the witness Devenport (Tr. 145, 146) "I could not come to a positive conclusion where [the gasoline fumes] did come from, a positive factual conclusion."

Curiously enough, this inability to draw a conclusion affected Devenport's testimony throughout, and on a great many issues. He stated first that it was "possible" that the fumes came from the exterior vents (Tr. 147). Then, after a warning by the court, he amended his opinion to say that it is reasonably probable that the fumes came from the vents (Tr. 148). It was only a few lines later, however (Tr. 149), that the witness was again referring to these vents

as a "possible" source of gasoline fumes. Obviously, the witness was unsure of himself, and had little reliance upon opinions (Tr. 150, 151), especially his own. Again in referring to the means whereby vapor entered the building, Devenport referred to the windows, doors, etc., as "possible" sources for gas fumes to get in (Tr. 152). While the trial court indulged what might have been a semantic lapse when defendant's attorney objected previously (Tr. 149), on this occasion the trial judge again directed the witness to give only opinions founded upon circumstances reasonably probable (Tr. 152). The warning was futile. Shortly thereafter, Devenport again referred to the window-frame holes by stating they "could be" a source for gasoline vapor (Tr. 157). That the witness meant exactly what he said was made quite clear when he observed, in respect of this contention (Tr. 176) "I stated that that could be the case, in my opinion. I didn't state categorically that that was so." Again (Tr. 178) "I did not say that the fumes came through. I said it was possible for those to come through and also possible for the fumes to come through the opening of the frame door at the rear of the building. Those are possibilities, sir." And again the trial judge intervened, following which the witness again amended his testimony to say that such "possibilities" were reasonably probable (Tr. 178). The amendment was short-lived, for Devenport returned almost immediately to his discussion of "possible" sources of vapor (Tr. 179). As the witness stated to the court to explain his frequent regressions to the realm of possibility, as it were, he had difficulty distinguishing between things "possible" and things "reasonably probable" (Tr. 180). Things to him could be both "probable" and "possible" at the same time (Tr. 182).

When pressed to select which alternative he chose to employ his opinion, Devenport very honestly answered "I don't care to make a choice" (Tr. 182). Actually, in predicating his opinions upon possibilities, Devenport was merely keeping safely within the ambit of what few facts he had. This is most aptly illustrated by the case of his opinions as to where the vapor came from in the first place. Having no facts to go on at all, the Chief had to stick to "possibilities" on that score.

In fact, Devenport appeared to be quite unable to grasp the concept of "reasonable probability." He considered things "possible" and things "reasonably probable" to be interchangeable and practically synonymous (Tr. 182).

Following this rather confusing series of opinions, plaintiff's attorney disclaimed his former assertions concerning Chief Devenport's capacity as an expert witness (Tr. 170), and stated that the chief was a fact witness, and "* * * not here in the capacity of an expert" (Tr. 184). No offer was made to withdraw the expert opinions put by Devenport before the jury.

Concerning the route followed by the vapor, Devenport's opinions were equally confusing. He stated, several times, that it was either probable or possible that fumes came from one or more of the outside vents and entered the building at one or more of the openings described (Tr. 185, 186, 187, 189). There was, however, one point upon which there was absolutely no confusion. Defendant's attorney asked whether Devenport could state with a reasonable degree of probability whether gasoline fumes came out of the vents on the side of the building *or* whether such fumes came out

of the vents at the rear of the building. The witness was pointedly frank in stating that he could not tell whether such fumes came out of either set of vents (Tr. 190, 191) with a reasonable degree of accuracy. He was even more frank a few moments later when he blandly admitted that his whole prior testimony as to the source of the vapor and its possible routes into the building was given without any basis in fact as to the actual origin of the fumes themselves (Tr. 191). This testimony, following as it did the scene of vacillation just described, indicated that Devenport probably was intelligent enough to recognize the difference between "possible" and "probable" when faced with an inescapable necessity to select the alternatives, in defendant's opinion.

Plaintiff did not directly indicate the agency that ignited the vapor in the building, if such actually occurred. The suggestion was made, however, through Devenport's testimony that the brushes on the air compressor arced against the commutator (Tr. 138). No attempt was made to show that these brushes probably sparked before the fire. In fact, plaintiff's witness DeMarco stated that he had never seen sparks from the compressor prior to the fire (Tr. 60). However, Devenport testified that while he was making his investigation immediately after the fire, the compressor started up and the brushes on the motor arced excessively (Tr. 138). When asked what he meant by "arced", the chief volunteered that he meant that there was a "visible electric arc." Those were his own words. Plaintiff's attorney then asked, "What do you mean by a visible electric arc?" (Tr. 138). The answer, although in the vernacular, was quite enlightening. It was: "You got me" (Tr. 139).

The reason Devenport speculated about the possible exterior source of gasoline vapor was that he could find no container inside the building that had held a volatile liquid (Tr. 144). Plaintiff's witness Dworak had had the same idea as Devenport originally had; that is, to look for a container of gasoline inside the station. But his search was equally fruitless (Tr. 233). However, there had been a bucket of gasoline inside that station just before the fire. Soso Cokinos had seen it in decedent's possession (Tr. 305). Schultz had been using it to clean tools (Tr. 284) and by this activity had generated such a quantity of vapor that Soso was moved to go elsewhere. Shortly thereafter the fire occurred (Tr. 301).

Devenport served plaintiff in one further facet of the case. Plaintiff's thesis, as disclosed by almost the entire testimony of DeMarco, was that defendant maintained the gas station in an unsafe and hazardous condition. It was shown that the premises were leased from defendant; that defendant appears to have installed some tanks for gasoline in 1940, and supplied divers items inside the station itself, including the air compressor. Of the five vents, it was made clear that two were *not* put up by defendant. Thus plaintiff had to resort to Devenport in an attempt to cover this factual opening in its circumstantial collection.

As has already been noted, Devenport could not say that, in any degree of probability, the source of the vapor that started the fire was the vents installed by defendant. Therefore, plaintiff tried to use Devenport as an expert on the question of the proper way to *maintain* a gas station (Tr. 158). Plaintiff began by asking whether there was a custom in the trade governing the height of tank vents.

Defendant objected and the court observed that the proper standard would be that in effect in 1940 when the vents built by Aquino Construction Co. were installed. Devenport wasn't asked further by plaintiff on that subject. Shifting his approach, plaintiff's attorney then asked Devenport whether the station, as maintained on the date in question, was a safe place to work (Tr. 160). Defendant also objected to this approach because the witness was not qualified, and the court sustained that objection (Tr. 160, 161). The third approach, however, was to prove more successful—but not much more.

Plaintiff finally asked the witness whether the vents, as they were maintained at the time in question, were adequate to diffuse gasoline vapor from the underground tanks (Tr. 162). As noted by the court, he had said previously that the vents should have come above the roof level, which admittedly they did not. This time, however, plaintiff got a surprise because Devenport replied that these vents *were* adequate for diffusing gasoline vapor (Tr. 163). Then the chief went on to state that he thought that the recommended practices of certain fire associations should be observed (Tr. 164). His offer to testify as to what those recommended practices were was rejected as incompetent by the court. Finally, Devenport stated that, in his opinion, vents should extend above the roof. Defendant's objection to this testimony was interrupted by a further question to Devenport as to whether having the vents below the roof-line was safe or unsafe. The objection to this was sustained.

Although throughout this part of the examination, the court ruled consistently against plaintiff, plaintiff's attor-

ney stated that he did not consider these rulings prejudicial to his client's case (Tr. 165). The last word on the subject was spoken when Devenport admitted that there was no regulation in the Building Code, the Fire Code or any ordinance of the City of Paterson prescribing the minimum height for a vent pipe (Tr. 212, 213).

This was the entire attempt of Plaintiff to produce evidence of any conduct of defendant which could be alleged to have been negligent.

In contradistinction to plaintiff's offer of proofs as to how the fire in question occurred, defendant produced Dr. Clarence W. Winchell, an expert witness of extensive formal education (Tr. 311, 312), practical training (Tr. 312) and years of public service (Tr. 312 to 314), the latter of which included the investigation of fires (Tr. 332), some of which were serious gasoline fires. Dr. Winchell made a thorough and detailed investigation of Tubby's Gas Station, involving seven different occasions (Tr. 314, 319).

First, Dr. Winchell checked the station, inside and out for char, burns, scorch and blisters caused by the fire, and made several photographs which were introduced in evidence showing the burn patterns he found (Tr. 320, 321, 322). Considering Devenport's testimony, already discussed, concerning the arcing brushes on the air compressor, and the implicit suggestion that that phenomenon ignited the vapor in the station, it is significant to note especially that Dr. Winchell found that the underside of the bench covering the air compressor showed a scorch pattern but no blister pattern. Further, he observed that the scorch pattern was there solely because the wood had had no paint on it (Tr. 323). Most significant, however,

was the further fact that that scorch on the underside of this shelf was only marked at the front edge, and *lessened as one observed to the rear.* This, concluded the doctor, was the mark of a radiation or flame shadow; in other words, no direct blaze touched this wood, so close to the supposed spark that struck the vapor into flame.

Next, Dr. Winchell tested the vent pipes to see whether they emitted any vapor (Tr. 340). In part, he used a gas tester (Tr. 341) (perhaps one not unlike that Chief Devenport had but didn't use) (Tr. 202). The test showed that no vapor came out of the vent pipes (Tr. 342).

The witness made a special series of experiments to determine whether air leaked into and out of the station itself. He sprayed some strongly odorous mists outside in the vicinity of the building, both on calm days and when there was a wind from the side where the vents were located. No one inside the station noticed these smells under either set of circumstances (Tr. 343, 344). With respect to gasoline vapor itself, the doctor testified that it was three to four times heavier than air (Tr. 345), that in still air it flows directly down, becoming more and more dispersed, so that it is not combustible after it has descended 15 or 20 inches from the escape orifice in the vent pipe (Tr. 347, 348). Moving air, he said, disperses vapor with much greater rapidity and also dilutes it a great deal more (Tr. 348).

From his knowledge of the foregoing facts and his inspection of the premises, as well as his expert knowledge, training and experience, Dr. Winchell concluded that, on the date in question, there was a flash fire and resultant explosion inside the gas station caused by fumes within the building. He stated flatly that these fumes could not have

come from outside (Tr. 349), but rather that it was most probable that such fumes come from a container in the office (Tr. 349). From the physical data observed by him Dr. Winchell was able to fix the exact point within the station at which the container lay when the fire occurred (Tr. 350, 351).. This conclusion became even more impressive when it appeared on cross examination that the doctor had arrived at his opinion without even knowing of the existence of the bucket Soso Cokinos testified he saw John Schultz using (Tr. 376).

ARGUMENT.

POINT I.

Plaintiff offered no evidence which, if given its fullest probative force, reasonably tended to support the advanced claim.

(A)

None of plaintiff's evidence as to causation brought the claim of negligence within the realm of probability.

There was no direct evidence of any act of any defendant, much less this defendant, which might have caused the fire and the consequences that followed. All that plaintiff offered was evidence of certain surrounding circumstances from which, it was hoped, inferences of causal connection might be drawn.

In a case involving damages resulting from explosion and fire caused by a flamable liquid, whether the defendant's negligence caused the injuries is a question of fact which must be established by the evidence within the realm

of probability. *Flexmir, Inc.* vs. *Lindemann & Co.*, 4 N. J. 509, 73 A. 2d 243 (1950). To recover for injuries allegedly resulting from the negligent act of another, especially where the evidence is circumstantial, plaintiff must show "not a possibility only, but a probability that the injury resulted from defendant's negligence." *Woschenko* v. *C. Schmidt & Sons*, 2 N. J. 269, 66 A. 2d 159 (1949). The jury should not be left to speculate and deal in possibilities rather than probabilities. *Idem.*

As has been noted, plaintiff's only witness as to causation and negligence was Chief Devenport. And, as appears from the discussion of his testimony, he was unable to state with a reasonable degree of probability whether gasoline vapor came out of the vents on the side of the building or whether such vapor came out of those in back. Further, this witness's entire testimony, both as to the origin of the vapor and as to how he thought it got into the station office, was a series of confusing changes between "possibility" and "probability". Devenport was so unsure of himself, and his opinion on these points that he refused even to elect between the alternatives of "probable" and "possible", although it became apparent that the distinction between the two was not lost upon him. Defendant submits that such evidence fell short of the standard that evidence must meet before it is entitled to a jury's consideration.

Merely being an expert is not enough; such a witness must have facts to support his opinions. *Beam* v. *Kent*, 3 N. J. 210, 69 A. 2d 569 (1949). Defendant submits that it appears of record that Devenport had no such facts underlying his opinions. Thus, plaintiff's argument that the

witness supplied a "probable" causal connection needed to establish defendant's liability must fail. For instance, plaintiff claims the chief testified that pumping gasoline could have caused this discharge of gas fumes, and in his opinion such was the cause. No witness testified that any gasoline had been pumped prior to the fire. Plaintiff contends that Devenport said the vent pipes were dangerous in use, but Devenport had testified (in response to a question from plaintiff's own attorney) that these vents were adequate for diffusing gasoline vapor. From the "possible" sources of entry of vapor into the building, the chief's opinion that vapor actually did enter the station thusly was without factual foundation. In fact, he honestly refused to say that such actually occurred, in all probability.

Where the evidence is all circumstantial, plaintiff must show not only that the injury resulted from defendant's negligence but must "exclude the idea that it was due to a cause with which the defendant was unconnected." *Szczytko* v. *Public Service Coordinated Transport*, 21 N. J. Super. at 264.

The record shows affirmatively in this case that the fire, in all probability, was caused by acts with which defendant was wholly unconnected; namely, decedent's own conduct. That a bucket of gasoline was the most likely source of this fire was even the initial idea of plaintiff's own witnesses Devenport and Dworak. The testimony of defendant's witness Cokinos that Schultz was using a bucket of gasoline just before the station exploded is still uncontradicted in the record. And Dr. Winchell's conclusion that such a bucket was the focus and origin of the heat and flame generated by the fire stands also uncontradicted. Thus, the

entire evidence herein negatives any inference that the injury to decedent was the probable consequence of any act of defendant.

(B)

There is no evidence of a negligent act of defendant.

The right of plaintiff to recover in negligence is predicated upon defendant's failure to observe its duty of care toward plaintiff, and the duty of care is proportionate to the foreseeable risk. *Harpell* v. *Public Service Coordinated Transport*, 20 N. J. 309, 120 A. 2d 43 (1956) "* * * [I]f the defendant * * * knew, or had reason to know, of the danger of injury * * *, then it was under the duty to take reasonable steps to avoid such injury." *Holly* v. *Meyers Hotel and Tavern, Inc.*, 9 N. J. 493, 89 A. 2d 6 (1952).

Plaintiff claims defendant ought to have foreseen the likelihood that decedent might be injured working at Tubby's because the gasoline distribution facilities were unsafe. Who says that they were unsafe? Plaintiff's claim that Devenport tried to say so is amply refuted by the witness Devenport himself when he said that the tank vent pipes were an adequate means of diffusing vapor. If this be believed, what difference does it make whether the witness thought the vents should have been constructed otherwise? Defendant submits that it is immaterial. *Ball* v. *Atlantic City Ambassador Hotel Corp.*, 137 N. J. L. 744, 57 A. 2d 362 (E. & A. 1948). So far as plaintiff's evidence goes, the source of the vapor herein is a guess, its route to the scene only wild conjecture, and no evidence has been produced that this hypothetical vapor caused plaintiff's injury herein. Negligence in the abstract—negligence in

the air, so to speak—will not do. Plaintiff must show the *act* which was negligent. This has not been done.

Rather, to the contrary, the uncontroverted testimony of Dr. Winchell established not only that the height of the vent pipes had no connection with the fire, but, also that, in any event, it would have been absolutely impossible for vapor from those pipes to enter the station in such a way as to cause the fire. Contrary to plaintiff's assertion, the proof is not that defendant constructed the vents. Two of those vents were constructed by someone else. And plaintiff was unable to establish whether the fumes it speculated came from tank vents came from vents constructed by defendant.

As to the maintenance of the station generally as "a safe place to work", plaintiff offered no competent evidence on the point. An attempt was made to have Chief Devenport testify in this regard, but the court ruled that the witness had not been qualified for any such subject. Admittedly, it was within the court's discretion to rule on the competence of a witness. With respect to this ruling, plaintiff's attorney stated that his case had not been hampered by the ruling just mentioned, among others (Tr. 165). *Now* complaint is made that this ruling, and those associated with it, resulted in a prejudicial denial of rights of petitioner.

While it may be, in the abstract, a jury question, as plaintiff contends, whether the station was safe and whether the vents were high enough, these facts did not become material until it was made to appear that the fire occurred as the natural consequence of such conditions, for damages to be chargeable against an alleged wrongdoer must be the natural consequences of his delinquency; "natural" im-

porting that they are such as might reasonably have been foreseen. *Smith* v. *Public Service Corp.*, 78 N. J. L. 478, 75 A. 937 (E. & A. 1910). Negligence is never presumed, it must be proven. *Callahan* v. *National Lead Co.*, 4 N. J. 150, 72 A. 2d 187 (1950). In failing to show that any act of defendant was the natural predicate to the injury to John Schultz, plaintiff failed to define as negligent any act or condition for which defendant was responsible. Also, as a result of such failure, plaintiff failed to show that defendant ought to have foreseen that anything it did would cause a fire injuring John Schultz.

To carry this a step further, defendant's witness Winchell testified that the cause of the fire was vapor rising from a container inside the building itself. This evidence not only was not contradicted, but it coincides curiously with the theory adopted originally by plaintiff's own witnesses, Devenport and Dworak. Cross examination reinforced it. And the testimony of Soso Cokinos took this hypothecated origin of the fire out of the area of circumstantial evidence and placed it in the realm of direct evidence. Thus defendant's uncontradicted evidence completely negatived the frail case put in by plaintiff and, in defendant's opinion, made it legally impossible for any jury to render a verdict for plaintiff, because there was no proof of negligence on the part of defendant.

POINT II.

Involuntary dismissal of the complaint was proper.

The evidence at the trial failed to raise a factual issue either of negligence or of causation. In this posture, the trial court was obliged to enter judgment for defendant for the law required that it do so. *Ferdinand* v. *Agricultural Ins. Co. of Watertown, N. Y.*, 40 N. J. Super. 1, 122 A. 2d 1 (App. Div. 1956), reversed on other grounds at 22 N. J. 482 (1956). All the jury could have done, if they had been given the issue, was speculate as to negligence and causation (as Devenport himself had speculated). That degree of proof is not enough to entitle plaintiff to have the jury's verdict on the case. *Shellhammer* v. *Lehigh Valley R. Co.*, 14 N. J. 341 (1954); cert. den. (1954) 347 U. S. 990, 98 L. Ed. 1124; rehear. den. (1954) 348 U. S. 852, 99 L. ed.

Defendant submits that the best that can be said of plaintiff's evidence is that it amounted to a mere scintilla of what would be necessary to prove a *prima facie* case. But frail proofs do not protect a plaintiff from being nonsuited. *Krolak* v. *Chicago Express, Inc.*, 10 N. J. Super. 60, 76 A. 2d 266 (App. Div. 1950), and the jury could not in this case have legitimately concluded that defendant had been negligent and caused the fire. Thus, involuntary dismissal of the complaint was proper. *Gentile* v. *Public Service Coordinated Transport*, 12 N. J. Super. 45, 78 A. 2d 915 (App. Div. 1951). Any such inferences which might be collected from the evidence in the present case are not superior to other inferences drawn from the great weight of the evidence which indicate the absence of negligence. *Layton* v. *Healy*, 12 N. J. Super. 459, 79 A. 2d 894 (App.

Div. 1951). Thus, the trial court had no choice but to grant defendant's motion asking that the complaint be dismissed. *Giuliana* v. *Ginnelly*, 6 N. J. Super. 76, 69 A. 2d 888 (App. Div. 1949). Taken as a whole, and critically examined, defendant submits that no reasonable and rational inference can be drawn from the evidence that defendant negligently and proximately injured plaintiff. *Mortgage Corp. of N. J.* v. *Aetna Cas. & Surety Co.*, 19 N. J. 30, 115 A. 2d 58 (1955).

POINT III.

The Appellate Division's decision herein is in accord with established law.

A judgment of nonsuit will be affirmed if it can be justified on any legal ground, even though reasons given by the trial court for its action may be erroneous. *Iuliucci* v. *Rice*, 130 N. J. L. 271, 32 A. 2d 459 (E. & A. 1943). Even a ground not relied on by the trial judge can be used to sustain his action by a reviewing court. *Adams* v. *Olsen*, 107 N. J. L. 288, 131 A. 596 (E. & A. 1930).

Where a trial court grants a motion of involuntary dismissal, pursuant to R. R. 4:42-2(b), and this action is appealed, it is the duty of the Appellate Division to examine the entire record and construe the facts in evidence most strongly in favor of the plaintiff. *Fenning* v. *American Type Founders*, 33 N. J. Super. 167, 109 A. 8d 689 (App. Div. 1954). This is the same protection afforded the plaintiff when the motion is made in the trial court. *McKinney* v. *Public Service Interstate Transp. Co.*, 4 N. J. 229, 72 A. 2d 326 (1950). The courts below knew this and recognized

their duty in this case to act as stated. It carefully reviewed all the evidence in the light of the principles of law stated above and concluded that the trial judge has not committed error in granting defendant's motion for judgment of involuntary dismissal. Now petitioner complains that the protection of this procedure was accorded thoroughly below.

Petitioner's claim that the decisions below were not in accord with "established law", and thus violated her federally-protected rights, must stand or fall on the strength of the legal issue made by the petition. This Court has already satisfied itself that where a plaintiff cannot make out a *prima facie* case on the issue of liability under the present New Jersey Constitution, and the Rules of Court governing procedure promulgated pursuant thereto, and thus is non-suited by the trial judge as a matter of law, such action does not merit review by way of certiorari *even where the claim asserted is pursuant to a federally created right and trial by jury is guaranteed by the statute establishing that right. Shellhammer* v. *Lehigh Valley R. Co., supra.* In order for the case of *McAllister* v. *United States of America* (1954), 348 U. S. 19, to be applicable herein, petitioner must show that at least one "probable" cause of the fire was supported by substantial evidence. This was not done at trial, and while the bits and pieces of the record incorporated into the petition might add a gloss of verity to petitioner's complaints now, the fact is that the whole record soundly rebuts any notion that there is virtue in these presently-proffered complaints.

POINT IV.

Plaintiff was not denied any right to trial by jury.

Truly, petitioner's assertions that the courts below violated either the letter or spirit of the 14th Amendment raises only a colorable issue—not a genuine one—much like that in *Colacurcio Contracting Corp.* v. *Weiss,* 20 N. J. 258, 119 A. 2d 449 (1955). The right to trial by jury is subject to State regulation, and the 14th Amendment has not affected the power or right of a sovereign to alter the forms of its judicature. *Morris* v. *Becker,* 6 N. J. 457, 79 A. 2d 29 (1951). Whether a state court should err, even prejudicially, in construing the constitution of the state, or any of the statutes enacted thereunder, such error does not of itself create a federal question. *West* v. *Louisiana* (1904), 194 U. S. 258, 48 L. 2d 965. It is only when the issue becomes intimately involved with a substantial federal right that this Court will intervene. *Hill* v. *Smith* (1923), 260 U. S. 592, 67 L. 2d 419. Probably the best catalogue of the sort of rights involved is offered by petitioner herein. But cases involving the rights of criminals to counsel, cases involving the constitutionality of a state tax statute, cases involving the sufficiency of process upon defendants or respondents, cases involving convictions for contempt of court, cases of unlawful arrest and cases dealing with procedure governed by federal statute or court rule (which pretty well sums up the authorities cited by petitioner at pages 6 through 9) have absolutely nothing to do with the simple question of whether plaintiff at the trial below made out a *prima facie* case. Detailed citation and discussion of petitioner's authority on those pages cannot, we submit,

alter this simple fact. And the determination that plaintiff's proofs fell short of what the law requires is the single essence of this application. Only the full statement of all the facts recited *ante* candidly illuminates this issue, and shows the hollowness of the petition's substance.

The present Constitution of New Jersey provides that "The right to trial by jury shall remain inviolate * * *." Const. Art. 1, par. 9, N. J. S. A. This right is jealously guarded by our courts. *Panko* v. *Flintkote Co.*, 7 N. J. 55, 80 A. 2d 302 (1951). It is, however, neither enlarged or restricted by the quoted language and accords generally to the right existing when the State became independent of the British crown. *Steiner* v. *Stein*, 2 N. J. 367, 66 A. 2d 719 (1949); *Town of Montclair* v. *Stanoyevich*, 6 N. J. 479, 79 A. 2d 288 (1951).

Can it be said that, at any time in history at which one would fix the point of reference, the claims of one private person against another had to be submitted to a jury if litigated at common law? It is submitted that, whatever procedure may have been pursued, no defendant might ever be taxed to submit to a jury a claim which on its face was insufficient in law. And similarly, no defendant may be burdened to submit an issue of fact for decision until plaintiff show a valid issue exists. This is the basis—the very essence—of the scintilla rule. A mere assertion before this Court cannot change the shadow of a right into a substantial right denied. The *facts*, fully stated and fully explored, are the sole criteria upon which the asserted right may be shown to have been deprived. Defendant submits that plaintiff has not shown any deprivation. Contrary to plaintiff's assumption (at p. 22), defendant has raised an issue

of its liability. The case below was tried on that point. That is the very point at which the proofs of plaintiff weakened and gave way.

POINT V.

Petitioner shows no right to certiorari.

Petitioner, in Point III, implies that the proceedings below were not a fair trial, that the courts below were not fair tribunals and that plaintiff's rights at trial were "persistently" trespassed. Contrary to assertions there made, the issue of the public safety from transported and stored gasoline was not even raised by the complaint, much less litigated. Also, contrary to assertions there made (at p. 24) the evidence of plaintiffs was neither "uncontradicted" nor "uncontradictable". Defendant's proofs were a total and devastating rebuttal of plaintiff's theories, beyond peradventure. To submit such evidence as plaintiff's to a jury would be both a mockery and an injustice.

As said before, this is a plain personal injury negligence action. Despite petitioner's strenuous and zealous efforts here, it cannot by some juridic sleight-of-hand be transformed into a "federal case". Until now, plaintiff hadn't even made such an effort.

Rule 19 requires that the record below in respect of federal questions be made plain by the petition, but one may search earnestly throughout the petition for a single mention of even one place in either the trial record or the appellate record where a federal right was raised by plaintiff. The search will be fruitless. This Court, long ago, ruled

on an appeal from the New Jersey Court of Errors and Appeals that matters not presented to the courts below may not be raised initially before you. *Edwards* v. *Elliott* (1874), 88 U. S. 532, 22 L. ed. 487, affirming 36 N. J. L. 449 (E. & A. 1873). This Court has not seen fit to diminish the strength of that decision.

Conclusion.

For the reasons stated, we respectfully submit that the petition for the issue of a writ of certiorari should be denied.

Respectfully submitted,

SCHNEIDER, LUSTBADER & MORGAN,

By PHILIP M. LUSTBADER,
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Appendix I.

1:10-2. Certification to the Appellate Division on Petition.

Certification to the Appellate Division is not a matter of right, but of sound judicial discretion, and will be allowed on final judgments only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered:

(a) Where the Appellate Division has decided a question of substance not theretofore determined by a court of last resort of this State, or has decided it in a way probably not in accord with applicable decisions of such court.

(b) Where the decision under review is in conflict with any other decision of the Appellate Division.

(c) Where the judges of the Appellate Division concur in result, but are unable to agree upon a common ground of decision.

(d) Where the Appellate Division has decided an important question of law which has not been, but should be settled by this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower tribunal as to call for an exercise of this court's supervision.

(e) Where the Appellate Division has decided a question of substance relating to the construction or application of a statute of this State, which has not been, but should be settled by this court.

NOTE: Formerly Rule 1:5-2.

Appendix II.

1:10-3. Certification to Trial Courts on Petition.

Petitions for certification to the trial courts will be entertained on final judgments only in the following types of cases:

(a) Where a substantial question arises under the Constitution or a statute of the United States or of this State, which is of general public importance and which urgently requires adjudication by this court.

(b) Where questions of great public importance are involved which urgently require prompt adjudication.

NOTE: Formerly Rule 1:5-3.